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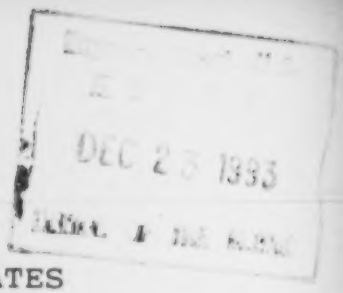

NO. 93-992

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BARTOLOME E. ABUAN, et al.,
Petitioner

V.

GENERAL ELECTRIC COMPANY and
MONSANTO COMPANY,
Respondents

Petition for Writ of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that (1) Plaintiffs' expert reports failed to adequately present evidence that the individual plaintiffs were individually reasonably medically certain to incur future disease as a result of their toxic exposure and thereby did not show the requisite increased risk of injury; and (2) plaintiffs' experts had failed to show that plaintiffs had suffered a "significantly" increased risk of contracting a serious latent disease as is required to recover the costs of medical monitoring which they failed to do because the evidence did not define the significance of the increased risk with respect to individual plaintiffs.

ADDITIONAL PARTIES

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REFRENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Opinion of the Ninth Circuit in this matter is reported at 3 F.3d 329 (9th Cir. 1993). The District Court Opinion, included in the Appendix infra, is unreported.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked by virtue of 28 U.S.C. §1254 and by the Supreme Court Rule 17. Petitioner seeks review of an Order of the Ninth Circuit dated August 26, 1993.

STATEMENT OF THE CASE

A. BACKGROUND

On May 26, 1987, a General Electric transformer exploded at the Piti Power Plant on Guam. The plaintiffs in this action are workers of the plant who were exposed to the toxic substances during as well as after the explosion when they were required to clean up the effects of the explosion. Others were exposed when they worked in contaminated areas of the plant.

The United States General Accounting Office conducted an extensive study of the Piti incident and concluded that "the exact cause of the spill is unknown, but it is suspected that the cause was low-level arcing due to a breakdown in the dielectric strength of the PCB insulating fluid with a gradual increase in pressure." (Toxic Substances, PCB Spill

at the Guam Naval Power Generating Plant, September 1988, United States General Accounting Office ["GAO Report"], p. 9.) Earlier in the report, the GAO opined that "dioxins and furans, which are more potent than PCBs, can be generated where there is a fire-related or pressurized release of PCBs in which heat is generated." (GAO Report, p. 8)

The cleanup of the PCB-contaminated oil at the Piti Power Plant began almost immediately after the spill. The initial cleanup workers "entered the contaminated area before [the Navy] determined whether or not there was a potential for dioxin and furan contamination. As a result, the response team and the cleanup crews may have encountered contamination without proper protection." (GAO Report, p. 14)

The GAO made the following observation about these workers:

> ...A Navy-contracted report said that because some employees did not know that the failed transformer contained PCBs, PPE was not a consideration.
>
> Once [the Navy] determined that the oil contained PCBs, it evacuated most of the employees from the plant. However, some of the medical records we reviewed indicated that some workers stayed in the plant with no PPE [personal protective equipment]; 1 stayed in the plant an additional 8 hours.

(GAO Report, p. 28)

The adequacy of personal protective equipment ("PPE") worn by the emergency response crew which entered the plant approximately one hour after the spill was not much better:

> When the emergency response crew first entered the contaminated plant, about 1 hour after the spill, they wore PPE consisting of self-contained breathing apparatus, three layers of plastic bags over their shoes,

> Tyvek coveralls, painter's hoods, two layers of surgical gloves, and heavy neoprene outer gloves....
>
> The Tyvek coveralls used and plastic bags worn over shoes are not recommended for use during this type of accident. The coveralls have not been shown to be effective against the permeation of liquid PCBs. Even though OSHA regulations require that chemical-resistant footwear be used, the Navy outfitted its crew in several layers of plastic bags over normal work footwear. The required coveralls and footwear were not available at Piti during the early stages of the cleanup....

(GAO Report, p. 28)

Further:

> During the emergency response to and cleanup of the contaminates, the workers wore civilian clothes under the PPE because the recommended undergarments were not available. Since the Tyvek coveralls were transparent, it was necessary to have some type of undergarment....
>
> ....it was not uncommon for the contaminated oil and solvents to penetrate the Tyvek coveralls

> and soak through their clothes to their skin. One individual we spoke with told us that cleaning the overhead crane was particularly dirty work. To clean the crane, workers built a scaffold. To clean the underside of the crane and the trolley it rides on, the workers had to lie on their backs. This position caused solvent and contaminates to continually dribble on the clothing and eye protection worn by the workers.

(GAO Report, p. 31)

Of equal significance, those workers in the Piti plant at the time of the explosion were not wearing respirators. After the incident, "[they] described a fine mist in the air, and most described breathing problems as a result of being in or near the mist." (GAO Report, p. 30)

The respiratory protection provided to the subsequent cleanup workers was also inadequate:

> [The Navy] initially sent emergency response crews in to the plant on May 26, the day of

> the accident, with self-contained breathing apparatus. On May 27 [the Navy] replaced this apparatus with half-face respirators, and, by June 3 [the Navy] deleted the requirement for any type of respirator for those individuals not using solvents. However, at the time of our review, individuals going into the plant were required to wear full-face respirators because of the discovery of dioxins and furans.

(GAO Report, p. 30)

Wipe samples taken by the Navy after the spill showed PCB levels in the plant as high as 19,800 ug/100 cm^2 or almost 2000 times higher than USEPA cleanup criteria. Wipe samples taken June 23, 1987, almost a month after the spill, indicated levels of furans and dioxins as high as 3400 ug/100 cm^2, 340 times the USEPA cleanup criterion. The Navy and the workers did not receive these dioxin and furan results until July of 1987, almost two months after the spill. It was only then after the bulk of

the toxins were removed in an unsafe manner that cleanup was halted. Thereafter, the Navy contracted with an outside firm to finish the cleanup at a cost of more than three million dollars ($3,000,000.00).

In short, because of the late discovery of dioxins and furans, "workers may have been allowed to enter the contaminated portion of the plant early in the cleanup phase without wearing respirators of any kind." (GAO Report, p. 33)

The GAO Report gives the following summary of the varying levels of PCB exposure suffered by the various Piti employees:

> Of the 66 employees, 29 came into direct contact with the spill, including operators, mechanics, supervisors, and others working in the area. Some were contaminated when they

came into the spill area to see what happened or to help control or contain the spill so that it did not reach the water drains. After the release, a number of employees began to wipe up or contain the oil. They worked in the area of the spill about 15 to 30 minutes before they were told to evacuate the plant and go to the designated meeting place for emergencies outside the plant. It was about 1 hour before [the Navy's] safety officer informed those at the plant that the oil in the transformer contained PCBs.

Once the plant safety officer learned that the transformers contained PCBs, he told the plant supervisors not to let their employees go home. A bus had been requested to take them to the hospital for medical examinations. However, because the accident happened right at the shift change, some of the contaminated employees had gone home. When the bus arrived, 16 of the 29 employees who were directly exposed to the spill were taken to the hospital where they were told to strip, wash with waterless soap, dry, and then take showers. Afterward, they were given medical examinations, which included checking their vital signs and respiratory functions, taking

blood samples, and establishing a medical monitoring program for each individual.

An additional 9 employees, who either could not leave the plant earlier or had already gone home, came to the hospital during the next 3 days for medical examinations. Two of the remaining three employees reported to the hospital on June 1 and 4. The last of the 29 employees reported to the hospital on July 9, 1987. Navy officials stated that they did not know that the last employee to report to the hospital, a boiler plant operator, was in the plant until he reported to the hospital and told the doctor that he had been in direct contact with the PCBs.

On May 27 and 28, 1987, at the request of medical clinic officials, [Navy] officials told all plant supervisors to ask all employees who had been in the plant at the time of the accident or who thought they may have been close enough to the plant to be exposed to PCBs to report to the hospital for examinations. Eventually 37 employees reported to the hospital, stating that they had been inside the plant at the time of the accident. Six of the 37 employees did not report

> for examinations until September, and one reported in October.
>
> To be on the safe side, [Navy] and hospital officials decided to ask all Navy employees who thought they may have been exposed to PCBs to report for a medical examination. During the following months the number of employees who requested a medical examination reached 252, which includes 186 people who reported to the hospital even though they were not directly exposed.

(GAO Report, pp. 35-36)

The Navy originally sought to provide medical monitoring only to those individuals who had been "directly contaminated and those involved in the cleanup and decontamination." The discovery of dioxins and furans in the plant, however, compelled the Navy to expand its monitoring program to all individuals who had reported exposure - direct or indirect. (GAO Report, p. 38)

The PCBs involved in the Piti transformer explosion were produced by Monsanto, the sole manufacturer of PCBs in the United States. Monsanto's largest customer for PCBs was General Electric which placed them in the thousands of electrical transformers and capacitors which it sold throughout the United States and abroad. The United States Navy purchased several of the General Electric transformers filled with Monsanto's PCBs and installed them at the Piti Power Plant.

On May 25, 1989, plaintiffs instituted this class action against Monsanto and General Electric to recover damages for those injuries they sustained as a result of an explosion at the Piti Power Plant on Guam which caused them to be exposed to polychlorinated biphenyls

(PCBs) as well as to dioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs), and chlorobenzenes (CBs). Suit was initiated in the United States District Court for the District of Guam. Jurisdiction being based upon 28 U.S.C. §1332.

On September 28, 1990, the trial court issued a scheduling order which, inter alia, required plaintiffs to submit expert reports setting forth which plaintiffs suffered sufficient exposure to justify their claim for medical monitoring. Plaintiffs thereafter timely submitted expert reports opining that certain named plaintiff members had sufficient exposure to PCBs, PCDDs, PCDFs or CBs as a result of the Piti Power Plant incident to place them at increased risk of future injury for which they should be medically monitored. Specifically,

plaintiffs submitted the expert reports of Dr. Robert J. Rutman, a professor of biochemistry and molecular biology and the University of Pennsylvania as well as the expert report of Dr. Ronald Brecher, a toxicologist. Dr. Brecher submitted an expert report in which he listed each individual plaintiff, their exposure the toxic agents involved and thereafter opined on their likelihood for acquiring cancer and the need for medical monitoring. Specifically, Dr. Brecher stated:

> Based on the foregoing, my review of the plaintiffs' answers to interrogatories, questionnaires, personal statements and other documents I have reviewed on this case, it is my opinion, within a reasonable degree of scientific certainty, that these plaintiffs were exposed to PCBs, PCDFs, PCDDs, and/or CBs as a result of the Piti Power Plant incident on May 26, 1987, and that such exposure place these plaintiffs

> at an increased risk of future injury, illness or disease. It is my opinion that a regular and ongoing medical monitoring program is required for these plaintiffs in order to enable early detection and treatment of any adverse effects arising from these plaintiffs' exposures.

Defendants then filed motions for summary judgment alleging plaintiffs failed to state a cause of action. On February 25, 1992, the United States District Court for the Territory of Guam granted Defendant's Motion for Summary Judgment. Accordingly, plaintiffs timely filed an appeal.

The United States Court of Appeals for the Ninth Circuit affirmed the trial court's ruling concluding that: (1) Plaintiffs expert reports failed to adequately present evidence that the individual plaintiffs were individually reasonably medically certain to incur

future disease as a result of their toxic exposure and thereby did not show the requisite increased risk of injury; and (2) plaintiffs' experts had failed to show that plaintiffs had suffered a "significantly" increased risk of contracting a serious latent disease as is required to recover the costs of medical monitoring which they failed to do because the evidence did not define the significance of the increased risk with respect to individual plaintiffs.

ARGUMENT

The issues presented by this case deserve review on a writ of certiori under the criteria set forth in Rule 10.1 (a), Rules of the Supreme Court of the United States. The decision of the Court of Appeals conflicts directly with other courts of appeals on the same issues, prior decisions of the Supreme Court of the United States as well as the Federal Rules of Evidence.

A. INCREASED RISK OF FUTURE INJURY

In light of their exposure to toxic chemicals, plaintiffs have stated a valid claim for damages resulting from the increased risk of developing cancer and plaintiffs expert reports adequately reflect the damages sustained by each individual plaintiff herein.

The theory of liability in this matter emanates from the invasion of the body by the foreign substance, which immediately acts upon the body and sets in motion the forces that result in disease. Askey v. Occidental Chemical Corp., 102 N.Y. A.D. 2d 130, 477 N.Y.S. 2d 242 (1984). Historically, courts required a high standard of proof that any future disease might develop: "there must be such a degree of probability of their occurrence as to amount to a reasonable certainty that they will result." Id. A growing number of jurisdictions are moving away from this medical certainty rule and towards a less harsh standard. In 1963, six states including California, Connecticut, New Hampshire, and Pennsylvania applied a rule based on the "extent of the injury." This rule

entitles a plaintiff to recover damages for future illnesses that may result from present injury, without certainty that these illnesses will develop. See Note, Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief, 60 Wash. L. Rev. 635, 640 (1985). A number of courts have awarded damages based on expert opinions that the future diseases or illnesses were "possible" or "likely." See, e.g., Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984) (court properly awarded damages for future development of spinal meningitis while expert could only say plaintiff might possibly suffer this ailment); Feist v. Sears, Roebuck & Co., 267 Or. 402, 517 P.2d 675 (1973). Adoption of the "extent of injury" rule demonstrates a growing awareness that it is inappropriate to apply traditional tort

doctrines to claims for the increased risk of future disease from exposure to toxic chemicals because the potential injuries may take years to develop. Comment, Toxic Torts and Latent Diseases: The Case for an Increased Risk Cause of Action, 38 U.KAN.L.REV. 1087 (1990).

> Most often, ... medical experts are unable to establish this degree of certainty. Even in asbestos cases where the medical risks of exposure are well-established, the chances of acquiring an asbestos-related disease after exposure do not reach fifty-one percent. Consequently, the forty-nine victims out of one hundred that do develop a future disease go uncompensated under current doctrine.

Id. at 1092.

Indeed, other tort doctrines support the recognition of a cause of action absent a reasonable medical probability that the disease will develop. See, 38 U. KAN.L.REV. 1087, 1104 (1990). One such

doctrine is "loss of chance." This doctrine "involves instances in which plaintiffs are allowed to recover if they can prove that the defendant decreased the plaintiff's chances of obtaining a desired result, even though the plaintiff's injuries may not be directly traceable to the defendant." 38 U. KAN.L.REV. 1087, 1104. Indeed, in Herskovits v. Group Health Cooperative, 99 Wash. 2d 609, 615, 664 P.2d 474, 479 (1983), the court permitted plaintiff to recover where a negligent physician decreased his chances of survival by a mere fourteen percent. Id., 99 Wash. 2d at 615, 664 P.2d at 479. "Logically, there is no difference between decreasing a chance of survival by less than fifty percent and increasing a chance of death by less than fifty percent. Recognition of this degree of harm as

actionable in the loss of chance context merits similar recognition in the toxic tort context." 38 U. KAN.L.REV. 1087, 1104.

The recognition of a present cause of action for increased risk of future diseases, and adoption of the "extent of the injury" rule, would better serve the traditional tort goals of deterrence and compensation. The present system is ill-suited to deter toxic tort defendants because plaintiffs must wait until the disease manifests itself to sue. Id. at 1105. The application of the "extent of the injury" rule is more appropriate in toxic tort cases because it forces tortfeasors to assume responsibility for their actions immediately. In this way, they are unable to avoid compensating the victims. Also, by adhering to this new

standard and allowing a present cause of action for the increased risk of future diseases, this court would force society as a whole and those responsible for toxic chemicals present in our environs to deal with these materials' inherent dangers. Id. See also Note, Gone Today and Here Tomorrow: Damage Recovery for Subsequent Developing Latent Diseases in Toxic Tort Exposure Actions, 14 AM.J.TRIAL ADVOC. 15 (1990); Note, Ayers v. Township of Jackson: Damages for the Enhanced Risk of Future Disease, 5 PACE ENVTL.L.REV. 257 (1987).

In this case, the Ninth Circuit failed to realize that "the injury in an increased risk action is the increased risk itself, not the manifested disease. The probability at the time of the trial of the plaintiff developing cancer is

relevant only insofar as it must be used to determine how much the defendant has increased the risk of cancer." (Emphasis added) Note, 60 WASH. L. REV. at 589. Plaintiffs, here, have increased their chances of developing a future illness, in particular cancer, due to their exposure to PCBs. If the court follows the increasing modern trend toward adherence to the "extent of the injury" rule, then plaintiffs are certainly entitled to damages on their claim for increased risk of disease.

A recent case which illustrates a federal court's reluctance to tolerate summary judgment on the question of exposure in a toxic tort case is In Re Paoli Railyard Litigation, 916 F.2d 829 (3rd. Cir. 1990). In Paoli, plaintiffs were 38 individuals who worked at or lived

near a railyard from which PCBs, a component in railcar transformers, were released into the soil and air. Like the plaintiffs in the instant case, the Paoli plaintiffs claimed that they had been exposed to PCBs and that the PCBs had caused them a variety of specific injuries and had also caused them to suffer an increased risk of contracting future disease. The plaintiffs' claims were supported by various expert reports. After excluding the bulk of plaintiffs' expert evidence under F.R.E. 403, 702 and 703, the District Court for the Eastern District of Pennsylvania granted the defendants' motion for summary judgment. In reversing, the Third Circuit Court of Appeals criticized the trial court for its exclusion of plaintiffs' evidence at the pretrial stage and found that the

plaintiffs had raised issues of material fact as to all elements of their prima facie case.

Paoli is particularly significant to this case because, in material respects, the defendants' attacks on the plaintiffs' exposure evidence in that case mirrors their attack here. Notably, two of the defendants in Paoli, Monsanto and General Electric, are defendants in this case. It is therefore not surprising that the defendants in Paoli attacked the plaintiffs' prima facie case on exposure grounds virtually identical to those raised in the motion before this Court -- that, inter alia, the inability of the plaintiffs' experts to assign a precise number to the level of each plaintiff's PCB exposure level rendered the experts' conclusion insufficient. Id., at p. 842.

Although the Third Circuit rejected the Paoli defendants' attack on this basis, the Ninth Circuit failed to do so even though the facts were extremely similar.

As the Supreme Court recently stated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993):

> Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, e.g., Brief for Nicolaas Bloembergen et al. as Amicic Curiae 9 ("Indeed, scientists do not assert that they know what is immutably 'true' -- they are committed to searching for new, temporary theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science and the National Academy of Sciences as Amici Curiae 7 - 8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement")

> (emphasis in original). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e. "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

In the instant case, the Ninth Circuit placed an insurmountable obstacle in plaintiff's path to compensation by ruling that the plaintiffs expert reports failed to adequately present evidence that the individual plaintiffs were individually reasonably medically certain to incur future disease as a result of their toxic exposure and thereby did not show the requisite increased risk of injury.

B. MEDICAL MONITORING

Pursuant to the holding of the Ninth Circuit, in order to establish a cause of action for medical monitoring, a plaintiff must prove that:

> 1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
>
> 2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> 3. That increased risk makes periodic diagnostic medical examinations necessary.
>
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

In Re Paoli R.R. Yard PCB Litigation, 916 F.2d at 852; accord, Merry v. Westinghouse Electric Corp., 684 F. Supp. at 850; Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184 (1983),

vacated on other grounds, 202 N.J. Super. 106, 493 A.2d 1314 (1985).

The unique peculiarity of exposure to carcinogens is that doses capable of eventually producing cancer cause no observable symptomology predicting the likelihood of the disease, its degree of latency or malignancy. These types of cellular injuries are not detectable by routine medical, pathological or histological testing because they are imbedded in the genetic substance of the affected cell. Accordingly, there can be no statement of a predictable outcome for the exposed individual and it is impossible to aver that for this particular individual that it is reasonably medically certain that he or she will incur a future disease as a result of their toxic exposure. No

statement as to medical certainty can be made other than that the exposure has increased the likelihood that the exposed individual will contract the disease.

Additionally, the standards as set forth by the Ninth Circuit will make it impossible for plaintiffs to prove that they have sustained a "significant risk" of obtaining cancer. The reasons for this being:

1. The actual quantitative exposure of any "real individual" rather than the "average individual" cannot be known. The variables responsible for this effect include individual uptake rates, (i.e. respiratory, ingestive, absorptive) the uniformity and persistence of the contamination of the environment and environmental factors;

2. hereditary differences in the sensitivity to toxic chemicals;

3. differences in metabolism and detoxification;

4. variations in hormonal and nutritional effects;

5. variations in immune responses; and

6. variations in genotoxic repair capacity.

In the case of an average exposure to a carcinogenic substance, the increased risk of cancer can be calculated; this is the likelihood that the exposed party would get cancer above and beyond the normally existent likelihood. The risk measure is actually a statement of probability stating that whereas X persons in 1000 are ordinarily expected to get cancer, after exposure, X + Y can be

expected to get the disease. But whether any given individual will be part of the X + Y cannot be predicted since this information is not contained within the statistical analysis. The criterion set forth by the Ninth Circuit, that exposure has "made it more likely than not" that the exposed individual will contract the disease simply cannot be met. If this statement is required as proof for medical monitoring, there is no possibility for such an finding.

Additionally, under the circumstances present, the plaintiffs have produced ample evidence to support their claims for monitoring and surveillance. The Ninth Circuit however has held that plaintiffs failed to state how "significant" or relative the increased risk was for any individual. As previously stated, it is

scientifically impossible to quantify what the likelihood that an individual who has been exposed to a carcinogen will develop cancer. The Ninth Circuit, in violation of Federal Rule 702 and 703, took this issue out of the jury's hands and placed too great a burden on the expert to give an opinion which cannot be stated by any expert due to the factors enunciated above. Accordingly, it is clear that the Ninth Circuit went well beyond its in granting summary judgment in defendant's favor in contravention to Rule 702 and 703 of the Federal Rules of Evidence.

The rationale of a medical monitoring claim is that it is sound medical practice to seek medical surveillance to determine if plaintiff has contracted a disease caused by exposure to hazardous

substances. Because the defendant's actions caused the need for medical monitoring, such defendant may be required to pay the costs of the monitoring. Cook v. Rockwell Intern. Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991).

Indeed, "an action for medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm . . . ." In Re Paoli R.R. Yard PCB Litigation, 916 F.2d at 850; Cook, 755 F. Supp. at 1476. In a medical monitoring claim, the injury is the cost of the medical care undertaken to detect the injury. In Re Paoli R.R. Yard PCB Litigation, 916 F.2d at 850. As the Paoli court explained:

> The policy reasons for recognizing this tort are obvious. Medical monitoring claims acknowledge that, in a

> toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, as we have explained, recognizing this tort does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals and encourages plaintiffs to detect and treat their injuries as soon as possible . . . .

Id., at 852. See also, Herber v. Johns-Manville Corp., 785 F.2d 79 (3rd Cir. 1986) (New Jersey recognizes cost of preventative monitoring occasioned by tort as independent element of damages); Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (N.J. 1987) vacated on other grounds, 202 N.J. Super. 106, 493 A.2d 1314 (1985). ("Compensation for reasonable and necessary medical expenses is

consistent with well-accepted legal principles.... It is also consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease.") Id. at 311. See also, Hagerty v. L & L Marine Services, Inc. 788 F.2d 315 (5th Cir. 1986) (Seaman accidentally soaked with toxic chemicals while on duty entitled to recover from employer reasonable costs of medical checkups for cancer); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (D.C. Cir. 1984) (recognized claim for medical monitoring damages for children exposed to depressurization of airplane cabin); Merry v. Westinghouse Electric Corp., 684 F.Supp. 847 (M.D. Pa. 1988) (medical monitoring action can be premised

upon proof of exposure to hazardous substance resulting in potential for injury and need for early detection and treatment); Stead v. F.E. Myers Co., DC Vt., No. 89-169 (11/26/90); Burns v. Jaquays Mining Corp., 156 Ariz. 375, 752 P.2d 28 (Ct. App. 1988) (residents of land adjacent to asbestos-producing mill entitled to recover for medical surveillance of cancer development), review dismissed, 162 Ariz. 186, 781 P.2d 1371 (1989); Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984) (cost of preventative monitoring allowed); Coll v. Sherry, 29 N.J. 166, 148 A.2d 481 (1959) (cost of preventative monitoring allowed); Mauro v. Owens-Corning Fiberglas Corp., 225 N.J. Super 196, 542 A.2d 16 (1988), aff'd, 561 A.2d 251 (1989) (medical surveillance claim allowed to facilitate

early treatment necessitated by enhanced risk of cancer); Cook v. Rockwell Intern. Corp., 755 F. Supp. 1468, 1477 (D. Colo. 1991) (Colorado would recognize a medical monitoring claim).

In Askey v. Occidental Chemical Corp., 102 N.Y.A.D.2d 130, 477 N.Y.S.2d 242, (1984), the New York Supreme Court, Appellate Division, held that the future expense of medical monitoring of plaintiffs claiming the enhanced likelihood of medical problems due to exposure to toxic waste could be a recoverable consequential damage. The court held:

> The future expense of medical monitoring, could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are "reasonably anticipated" to be incurred by reason of their exposure. There is no doubt

> **that such a remedy would permit the early detection and treatment of maladies and that as a matter of public policy the tort-feasor should bear its cost.**

477 N.Y.S.2d at 247 (emphasis added).

Similarly, in Merry v. Westinghouse Elec. Corp, 684 F. Supp. 847 (M.D. Pa. 1988), property owners whose wells had been contaminated by toxic substances sought recovery for damages, including the cost of medical monitoring. Id., at 848. In denying defendants' motion for summary judgment, the court asserted that plaintiffs need not exhibit symptoms of a disease before seeking medical monitoring. Id., at 849. Furthermore, the court stated that Pennsylvania law did not require physical injury in order to maintain a claim for medical monitoring. Id.

Indeed, plaintiffs' experts in Merry

were unable to quantify the chances of contracting an exposure related disease. Moreover, the reports were not based on plaintiffs' physical examination, but on laboratory and clinical studies, among other items. Id., at 851. Nevertheless, despite the fact that plaintiffs' experts could not provide a scientifically sound conclusion as to the precise degree of risk faced by plaintiffs, the court stated that plaintiffs had proffered sufficient evidence to defeat defendant's summary judgment motion. Id., at 851. "It would be reasonable for a jury to conclude that the plaintiffs have a significantly but unquantifiably enhanced risk of serious disease, that such enhanced risk of disease justifies periodic medical examinations." Id., at 852.

In the instant case, the Ninth Circuit clearly erred in applying the standard enunciated above as it pertains to the required language to be included in an expert's report in a toxic tort case such as this.

CONCLUSION

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Sherman, Silverstein, Kohl,
Rose & Podolsky

By: _____
ALAN C. MILSTEIN, ESQUIRE
Attorneys for Plaintiffs

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the United States Supreme Court.

ALAN C. MILSTEIN, ESQUIRE

Dated:

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARTOLOME E. ABUAN, et al., Plaintiff-Appellant,	:	No. 92-15476
v.	:	D.C. No.
GENERAL ELECTRIC CO., MONSANTO COMPANY, Defendants-Appellees.	:	CV-89-00031-ARM

BARTOLOME E. ABUAN, et a]., Plaintiff-Appellee,	:	
v.	:	
GENERAL ELECTRIC CO., Defendant,	:	No. 92-15662 OPINION
and	:	
MONSANTO COMPANY, Defendant-Appellant.	:	

Appeal from the United States District
Court for the District of Guam
Alex R. Munson, Chief Judge, Presiding

Argued and Submitted
July 15, 1993-San Francisco, California

Filed August 26, 1993

Before: J. Clifford Wallace, Chief Judge, and Dorothy W. Nelson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Environmental Law/Torts/Government Law

The court of appeals affirmed a judgment of the district court. The court held that plaintiffs failed to prove a genuine factual issue regarding either the probability of future injury or the necessity of continuing medical monitoring resulting from alleged exposures to toxic chemicals.

Appellant Bartolome Abuan and a similarly situated class of plaintiffs were exposed to toxic chemicals when an

electrical transformer manufactured by appellee General Electric Co. ruptured, releasing PCBs manufactured by appellee Monsanto Company. Plaintiffs included workers exposed during the accident or its clean-up, and individual class members had varying degrees of exposure. Plaintiffs sued for personal injuries.

GE and Monsanto moved for summary judgment. Plaintiffs presented expert opinion from a professor of biochemistry and molecular biology that discussed the general conditions of exposure at the site of the mishap, but did not address the relative exposures of individual Plaintiffs. They also presented expert opinion from a toxicologist who concluded that Plaintiffs were exposed as a result

of the accident and that the exposure placed them at an increased risk of future illness that required continuing medical monitoring, but did not make qualitative or quantitative distinctions among the exposures of the various subgroups of Plaintiffs. The district court granted the motions, holding that Plaintiffs had failed to prove exposure to sufficient levels of toxics to establish proximate cause. Plaintiffs appealed.

[1] Because Plaintiffs failed to present evidence that they were individually reasonably medically certain to incur future disease as a result of their toxic exposure, they did not show the requisite increased risk of injury. [2] Further, Plaintiffs had to show that

they suffered a significantly increased risk of contracting a serious latent disease in order to recover the costs of medical monitoring, [3] which they failed to do because their evidence did not define the significance of the increased risk with respect to individual Plaintiffs.

COUNSEL

Alan C. Milstein, Leon H. Rose, Sherman. Silverstein, Kohl, Rose & Podolsky, Pennsauken, New Jersey, for the appellants-cross-appellees.

Murk A. Grinnis, Williams & Connolly, Washington, D.C.. and Thomas L. Roberts. Moore, Ching, Boertzel & Lawlor, Agana,

Guam, for appellee General Electric Company.

Jose H. Garcia, Bronson, Bronson & McKinnon. San Francisco, California, for the appellee-cross-appellant Monsanto Company.

OPINION

D.W. NELSON, Circuit Judge:

In May of 1997. an electrical transformer ruptured at the Piti Power Plant on the United States Naval Base in Guam, releasing a variety of toxic chemicals. Appellant Bartolome Abuan and a similarly situated class of plaintiffs ("Plaintiffs") sued General Electric Company ("GE") and Monsanto Company

("Monsanto") for injuries arising from the accident. The district court granted defendants' motions for summary judgment. Plaintiffs appeal from the grant of summary judgment, and Monsanto cross-appeals the district court's denial of its motion to dismiss for lack of personal jurisdiction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Until the late 1970's, Monsanto manufactured chemicals known as polychlorinated biphenyls ("PCBs"). GE purchased PCBs from Monsanto in order to produce Pyranol, a fire resistant dielectric fluid, which GE then used as insulation in electrical transformers and other devices. In 1949, GE sold one of

its transformers to the Navy and delivered it to Guam, where it was used at the Piti Power Plant. The junction box on the transformer ruptured on May 26, 1987, releasing its contents and allegedly exposing Plaintiffs to PCBs and other toxic chemicals. The Navy immediately instituted a cleanup program using local workers. Following the incident, the Navy established a medical surveillance program for workers who might have been exposed to the spill.[1] Plaintiffs include workers who were allegedly exposed to the chemicals during the accident or the cleanup.

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[1]A subsequent report concluded that the cleanup crew entered the area before officials had determined whether dioxin and furans had been released, without the recommended protective gear, and in some cases without proper training. General Accounting Office, Toxic Substances: PCV Spill at the Guam Naval Power Generating Plant 2-4 (1988)("GAO Report").

The Guam legislature subsequently authorized funding for suits by the workers against the United States, GE, and Monsanto. PCB Recovery Fund Act of 1989, Pub. L. No. 20-32, 9 Guam Sess. Laws 166. The legislature also enacted the Toxic Substances Exposure Compensation Act ("TSECA"), 10 Guam Code. Ann. §41101-07, to facilitate recovery for individuals injured by exposure to toxic substances. Plaintiffs brought suit against GE and Monsanto, alleging that they had been exposed to PCBS, dioxins, and furans as a result of the accident and requesting relief on grounds of negligence and outrageous conduct, strict products

liability, breach of warranty, civil conspiracy. and violations of TSECA.[2]

A class was certified on October 16, 1989. Monsanto's motion to dismiss for lack of personal jurisdiction was denied on April 20, 1990, Abuan v. General Electric Co., 735 F. Supp. 1479 (D. Guam 1990), and we denied Monsanto's petition for an interlocutory appeal. The district court entered a Scheduling Order on October 1. 1990, which provided:

> 4. By January 31. 1991, each claimant shall file and serve on defendants all medical and scientific opinions of experts. based on a reasonable degree of

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[2]Plaintiffs brought a separate class action against the United States and individually named defendants. See Figueroa v. United States, Nos. 92-15914, 92-16602 (9th Cir., argued July 15, 1993).

> medical or scientific certainty and expressed in report form, supporting each claimant's claim that he or she was exposed to a sufficient level of PCBS. PCDFs and/or dioxins as a result of the Piti Power Plant incident to require medical monitoring of said claimant and that such exposure placed claimant at increased risk of future injury, illness or disease.

Several claimants were subsequently dismissed for failing to be deposed or to answer interrogatories.

Defendants brought three separate summary judgment motions against the remaining class members. The district

court granted the first two motions, finding that Plaintiffs had failed to demonstrate: (1) sufficient evidence of exposure which placed them at an increased risk of future illness, injury, or disease, and (2) present physical injury, which was an essential element of Plaintiffs' common law claims.[3] Plaintiffs timely appealed. and Monsanto timely cross-appealed.

ANALYSIS

We review a district courts grant of summary judgment de novo. F.D.I.C. v. O'Melveny & Meyers, 969 F.2d 744, 747 (9th

[3]The third motion, which alleged that TSECA was unconstitutional, was not addressed by the district court and is not part of this appeal. Because we affirm the grant of summary judgment on the issue of exposure, we need not address the propriety of the district court's alternative holding that summary judgment was proper because plaintiffs had failed to introduce evidence of physical injury.

Cir. 1992). The evidence must he viewed in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact for trial, and whether the district court correctly applied the relevant substantive law." **Id.** Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 31 7 322 (1986).

The analysis in this case is complicated by the fact that there are no reported Guam cases on point. However, where "there is a substantial body of

legal authority under which affirmance is indicated, and in the absence of any indication that the local courts would reject that authority," we may affirm. Chase Manhattan Bank, N.A. v. Gems-By-Gordon, Inc., 649 F.2d 710, 713 (9th Cir. 1991). For this reason, we will look to the current trends in toxic tort jurisprudence to guide our analysis.

The district court found that Plaintiffs had failed to comply with the requirements of paragraph four of the Scheduling Order in that they had not introduced expert opinions, based on a reasonable degree of medical or scientific certainty, that they had been exposed to it sufficient level of toxic substances to succeed on their claims. The district

court found that Plaintiffs' expert reports failed to comply with relevant legal standards, and "admittedly made no attempt to indicate that any individual plaintiff was exposed to a sufficient level of toxins to justify future medical monitoring or conclude that a plaintiff faced an increased likelihood of future injury, illness, or disease due to exposure." In short, the district court found that Plaintiffs failed to introduce expert evidence sufficient to demonstrate the requisite proximate cause. After reviewing the reports, we agree.

1. Expert Opinions

Before we turn to the sufficiency of the evidence regarding exposure. a brief

summary of the expert reports is required. Plaintiffs rely heavily on the reports of Dr. Robert J. Rutman, a professor of biochemistry and molecular biology, and Dr. Ronald Becher, a toxicologist. Additional information regarding exposure was contained in the GAO Report.

Dr. Rutman submitted it cursory two-page preliminary report stating that in his opinion the Plaintiff... had been exposed to PCBS, PCDFS, PCDDs and/or CBs as a result of the accident, had an increased risk of future injury or illness, and required medical monitoring to detect possible adverse effects. Dr. Rutman's final report explained the potential toxic effects of exposure to the chemicals contained in the transformer

oils. He described in general terms the conditions of exposure at the Plant, but did not address the relative exposures of the different members of the plaintiff class.

> All cases of exposure to these carcinogenic chemicals inexorably lead to physical injury taking the form of present cellular damage to the genetic material (DNA). In my opinion, the available data show, to a reasonable degree of scientific certainty. that the Plaintiffs have sustained such physical injury to their cells. It is also my opinion that the exposures sustained by

> Plaintiffs, and responsible for this physical damage have significantly increased their risk of cancer, birth defects and other toxic effects. such [as] hepatic dysfunction and abnormal immune system function.
>
> An appropriate regimen of regular medical surveillance based on a scientifically designed schedule of examination and testing would seem to be fully justified ....

In his deposition, Dr. Rutman testified that he was "interested in producing ... [a] ballpark statement of whether these people had seen a negligible amount of chemical contamination or

something which was substantial and therefore had to be considered. I would not even begin to say that told me what the actual exposure was." He also opined that .. "we would reduce the cancer risk by something close to 50 percent if there were adequate monitoring of the entire population for early cancer..." (emphasis added).

Dr. Brecher's report described the results of various samples taken at the Plant after the accident, as well as the possible toxic effects of such exposure. Dr.Brecher stated:

> [It] is probable that anyone involved in the cleanup operation, or other related duties at the Piti Power Plant,

> from the time of the incident until December 28, 1987 or later was exposed to any chemicals present in the transformer oil. This exposure would have occurred both through inhalation and through the skin.

Dr. Brecher's report broke the plaintiff class into several categories. Each section reiterated how the individual plaintiffs claimed to have been exposed to chemicals from the transformer, and almost every section concluded:

> Based on the foregoing, my review of the plaintiffs' answers to interrogatories, questionnaires, personal statements and other documents I

have reviewed on this case, it is my opinion, within a reasonable degree of scientific certainty that these plaintiffs were exposed to PCBS, PCDFS, PCDDs and/or CBs as a result of the Piti Power Plant incident on May 26, 1987, and that such exposures placed these plaintiffs at an increased risk of future injury, illness or disease. It is my opinion that a regular and ongoing medical monitoring program is required for these plaintiffs in order to enable early detection and treatment of any adverse effects arising from these plaintiffs' exposures.

Dr. Brecher's categories ranged from the cleanup crew who had also been present in the Plant during the explosion to a woman who entered the Plant on the day of the explosion for ten to twenty minutes to look for her father. He made no quantitative nor qualitative distinctions between the exposures suffered by the different groups.

During his deposition, Dr. Brecher stated that he "did not develop a method for quantifying workers' exposures," and made a qualitative rather than a quantitative decision about exposure. "Any person who has a PCB exposure is at increased risk. And my definition of "increased risk," is risk increased compared to someone who has not been

exposed." He recommended that "anyone exposed to these materials in an involuntary release be subjected to a medical monitoring program." The district court noted that "Dr. Brecher believes that any exposure to a toxic substance, no matter how minute or fleeting, always places a person at increased risk and justifies medical monitoring. His personal belief is so all encompassing and amorphous that it is of no utility in the context of this lawsuit."

The GAO Report concluded that "29 employees were directly exposed to the PCB-contaminated oil" at the time of the accident. GAO Report at 2. Due to their lack of proper training, "Navy employees at Piti Power Plant were contaminated

with PCBS, and it is possible that they may also have been contaminated with dioxins and furans." Id. at 3.

One of Plaintiffs' other experts, Dr. Yoshito Masuda, reviewed blood samples taken from the members of the plaintiff class. However, Masuda drafted an article which concluded that the PCB patterns of the allegedly exposed workers were "not much different" from those of the control group.

II. Analysis

"In cases claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that she was, in fact, exposed to harmful

levels of such substances." Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1533 (D. Kan. 1990) (emphasis added). However, "precise data on the exact degree of exposure to each chemical" is not required. Harper v. Illinois Cent. Gulf R.r., 808 F.2d 1139, 1141 (5th Cir. 1987). Plaintiffs contend that their experts and the GAO report established sufficient exposure to preclude summary judgment.[4] In response, Monsanto and GE argue that because Plaintiffs would be required to prove sufficient individual exposures at

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[4]Plaintiffs also argue that exposure can be established through the testimony of individual class members alone. However they concede that the expert reports are necessary "insofar as they set forth the conclusion that such exposure was at levels proximately causing harm and justifying medical monitoring." Some jurisdictions do require expert testimony to prove causation. See, e.g., Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 892 (Ct. App. 1992).

trial, their failure to provide any expert testimony on this element mandates the entry of summary judgment.

It is clear that at some point in the litigation Plaintiffs would be required to prove individual causation and damages. See e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1200 (6th Cir. 1988) ("generalized proofs will not suffice to prove individual damages") (emphasis added). The expert reports established that the release of chemicals from the transformer had exposed Piti workers to PCBs. As Plaintiffs concede, however, the individual class members had varying degrees of exposure. The experts made no attempt to compare the exposure levels of these different workers, nor did they

provide any estimates of the relative increase in risk or need for future monitoring. The experts simply concluded that the workers had been exposed and, as a group, were at risk for future injury @ind required medical monitoring. This testimony simply did not suffice to meet the requirements of each chosen cause of action.

A. Increased risk of future injury

[1] A plaintiff who seeks damages for increased risk of future illness or injury "can recover only where he can show that the toxic, exposure more probably than not will lead to" the malady. Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 319

(5th Cir.), modified on other grounds, 797 F.2d 256 (5th Cir. 1986). See also Sterling, 855 F.2d at 1204 ("[w]here the basis for awarding damages is the potential risk of susceptibility to future disease, the predicted future disease must be medically reasonably certain to follow"); Mauro v. Raymark Indus., Inc., 561 A.2d 257, 264 (N.J. 1989) ("plaintiff must prove that the prospective disease is at least reasonably probable to occur"). None of the expert reports contained such a conclusion, and Plaintiffs do not claim to have presented evidence on this element. Summary judgment was appropriate with respect to this issue.

B. Medical Monitoring

[2] Although this issue is more difficult, we are convinced that the district court's conclusion was correct. In order to recover for costs of medical monitoring, a plaintiff must prove that:

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.

2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

3. That increased risk makes periodic diagnostic medical examinations reasonably necessary.

4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Brown v. Monsanto Co. (In re Paoli R.R. Yard PCB Litigation), 916 F.2d 829, 852 (3d Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991) (emphasis added). See also Merry v. Westinghouse Elec. Corp.,684 F. Supp. 847, 852 (M.D. Pa. 1998) (requiring "a significantly but unquantifiably

enhanced risk of serious disease"); Ayers v. Township of Jackson, 525 A.2d 287, 312 (N.J. 1987) (requiring "expert testimony predicated upon the significance and extent of exposure to chemicals ... [and] the relative increase in the chance of onset of disease"). Because the district court combined its discussion of medical monitoring with that of increased risk, it conducted no independent analysis of the exposure required to sustain a medical monitoring claim. The district court merely concluded that Plaintiffs had not presented competent expert evidence of exposure.

[3] Both the Rutman and Becher reports concluded in general that medical

monitoring was required in order to detect early signs of PCB-induced illness in Plaintiffs. Dr. Rutman also stated that, in his opinion, "the exposures sustained by Plaintiffs ... have significantly increased their risk of cancer, birth defects and other toxic effects, such as hepatic dysfunction and abnormal immune system function." Neither expert, however, attempted to state how "significant" or relative the increased risk was for any individual, either in the abstract or as compared to other members of the class. Thus, their evidence failed to meet the Paoli significance standard.

Moreover, the deposition testimony of the experts undercut the force of their reports. As the district court noted, Dr.

Brecher stated that "any exposure to a toxic substance, no matter how minute or fleeting ... justifies medical monitoring." Similarly, Dr. Rutman stated that "medical monitoring is justified at any level of risk," and opined that medical monitoring of the population at large would be "a good idea." Given the "amorphous" views of the experts and the dearth of conclusions regarding the quantitative (or even qualitative) increased risk to individuals, Plaintiffs failed to create a genuine factual issue on exposure and summary judgment was appropriate.

C. TSECA

The district court concluded that "plaintiffs have not only failed to show individual exposure, they have failed to show sufficient exposure, whether to individuals or the group of plaintiffs as a whole, even under Guam's extremely plaintiff friendly [TSECA]." TSECA allows "[a]ny person who has been exposed to toxic substances at a level above federally permitted levels of exposure" to bring an action for damages. 10 Guam Code Ann. § 41104.

> Federally permitted levels of exposure shall mean the maximum levels of exposure of humans as determined by federally [sic]

> regulatory agencies, including but not limited to [the EPA, OSHA, and NIOSH]. In the case of conflicting maximum permissible exposure levels, the lowest maximum permissible exposure level shall apply. For exposure in the work place, the eight-hour work place exposure level shall be considered the "federally permitted level of exposure." If no eight-hour work place exposure level exists, the lowest applicable maximum permissible exposure level shall apply.

10 Guam Code Ann. §41103(3) (emphasis added). The district court found that no

Plant sample revealed a PCB level higher than the sole "eight-hour work place exposure level," i.e., OSHA's standard (.5 mg/m3). See, 29 C.F.R. § 1910.1000(a)(2) (Table Z-1-A) (1992).

On appeal, Plaintiffs argue that the district court misread § 41103(3). They argue that the Act considers the "federally permitted level" to be "the lowest maximum permissible" level, regardless of whether or not another agency has set an eight-hour work place level. Plaintiffs then rely on Dr. Rutman's statement that Plaintiffs "necessarily inhaled contaminated air containing in excess of NIOSH limits of 1 ug/m3 of PCBs" to support their TSECA claim. However, a plain reading of

§41103(3) demonstrates that the "lowest applicable maximum permissible exposure level" applies only when there is no eight-hour work place exposure level. The parties agree that only OSHA has set an eight-hour work place exposure level. Because Plaintiffs have offered no evidence that their exposures exceeded the OSHA limit, summary judgment was proper on the TSECA claim.

CONCLUSION

We affirm the district court's grant of summary judgment on the grounds that Plaintiffs failed to introduce sufficient evidence of exposure to demonstrate the requisite proximate cause. Because we

conclude that summary judgment was proper, we need not decide whether the denial of Monsanto's motion to dismiss for lack of personal jurisdiction was error.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

BARTOLOME E. ABUAN, et al.,	:	Civil Action No. 89-00031
Plaintiffs	:	
v.	:	
GENERAL ELECTRIC COMPANY and MONSANTO COMPANY,	:	DECISION AND ORDER RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
Defendants	:	

THIS MATTER came before the Court on Thursday, January 30, 1992, for hearing of defendants' three motions for summary judgment. The motions seek summary judgment on the grounds that 1) plaintiffs have failed to show sufficient evidence of exposure to toxic substances

(polychlorinated biphenyls, or PCBs), 2) plaintiffs have failed to show present injury and, 3) the asserted unconstitutionality of Guam's "Toxic Substance Exposure Compensation Act," upon which plaintiffs base part of their claims.

THE COURT, having reviewed all matters on file, and having considered the written and oral arguments of the parties and all attached exhibits in support of and opposition to the motion, and being otherwise informed, rules as follows:

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides in part that a summary judgment

> ...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.CT. 2548, 91 L.Ed.2d 265 (1986). There can be no "genuine issue of material fact" if there is a complete failure of proof concerning an essential element of the non-moving party's case, since such a failure renders all other facts immaterial. Id., at 323.

"[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.... If the evidence is merely colorable... or is not significantly probative...summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202

(1986)(citations omitted). The mere existence of some alleged factual dispute is insufficient; there must be no genuine issue of material fact. Id., at 248-249. "As tc materiality, the substantive law will identify which facts are material. * * * That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which are irrelevant that governs." Id., at 248. Summary judgment is appropriate "If, under the governing law, there can be but one reasonable conclusion as to the verdict." Id., at 250.

Jurisdiction

This Court has jurisdiction based upon diversity. 28 U.S.C. § 1332(a). As a federal court sitting in diversity, the Court must apply Guam substantive law. Erie Railroad Co. v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938).

Summary of Defendants' Argument

Defendants move for summary judgment on three grounds: That plaintiffs have failed to show any injury as to the common law causes of action alleged in Claims One (negligence and outrageous conduct), Two (strict products liability), and Three (breach of warranty) of their Third Amended Complaint; that plaintiffs have failed to present sufficient evidence of exposure,

and thus cannot recover under either common law or statutory claims; and, finally, that the Guam Toxic Substance Exposure Compensation Act of 1990 is unconstitutional on several grounds, including violations of equal protection and due process.

For the reasons stated below, defendants' three motions for summary judgment are GRANTED.

Analysis

I. Plaintiffs Have Failed to Show Sufficient Evidence That Exposure, If Any, Has Placed Them at Increased Risk of Future Injury, Illness, or Disease

Paragraph 4 of this Court's scheduling order of September 28, 1990, stated:

By January 31, 1991[5], each claimant shall file and serve on defendants all medical and scientific opinions of experts, based on a reasonable degree of medical or scientific certainty and expressed in report form, supporting each claimant's claim that he or she was exposed to a sufficient level of PCBs, PCDFs, and/or dioxins as a result of the Piti Power Plant incident to require future medical monitoring of said claimant and that such exposure placed claimant at

[5]A subsequent order extended the time in which this information was to be provided to April 30, 1991.

increased risk of future injury, illness or disease.

Plaintiffs have failed to 1) provide any expert opinions based on a reasonable degree of medical or scientific certainty 2) that individual plaintiffs 3) were exposed to a sufficient level of toxic substances 4) to warrant future medical monitoring or 5) that any such exposure placed a plaintiff at an increased risk of future injury, illness, or disease.

1. The Expert Opinions

Plaintiffs submitted three reports, from Drs. Rutman, Schecter, and Brecher. None of the reports complies with the scheduling order or relevant legal standards. The reports of Dr. Rutman and

Dr. Brecher admittedly make no attempt to indicate that any individual plaintiff was exposed to a sufficient level of toxins to justify future medical monitoring or conclude that a plaintiff faced an increased likelihood of future injury, illness, or disease due to exposure.

Dr. Brecher believes that <u>any</u> exposure to a toxic substance, no matter how minute or fleeting, always places a person at increased risk and justifies medical monitoring. His personal belief is so all-encompassing and amorphous that it is of no utility in the context of this lawsuit.

None of plaintiffs' three experts was able to provide an opinion based on a

reasonable degree of scientific or medical certainty. A medical expert must be able to articulate that there is more than a mere possibility that a causal relationship exists between a defendant's negligence and the injury for which plaintiff seeks damages. See, e.g., Mayhew v. Bell S.S. Co., 917 F.2d 961 (6th Cir. 1990). Accurate information regarding the duration of exposure and dcse is critical and the court is justified in excluding expert opinions based on "critically incomplete or grossly inaccurate dosage or duration data." Christophersen v. Allied Signal Corp., 939 F.2d 1106 (5th Cir. 1991).

2. Individual Exposure

Plaintiffs have provided nothing regarding the issue of individual exposure.

3. Level of Exposure

Generally, mere exposure to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for emotional distress. Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1364 (S.D.W.Va. 1990), aff'd without published opinion as Joy v. Ball Technologies, Inc., 940 F.2d 651 (4th Cir. Aug. 5, 1991), Petition for cert. filed 60 U.S.L.W. 3388 (U.S. Nov. 4, 1991) (No. 91-759).

Here, plaintiffs have not only failed to show individual exposure, they have failed to show sufficient exposure, whether to individuals or the group of plaintiffs as a whole, even under Guam's extremely plaintiff-friendly Toxic Substance Exposure Compensation Act (TSECA).

TSECA requires a plaintiff to prove exposure above "federally permitted levels of exposure," which are defined as:

> The maximum levels of exposure of humans as determined by federally (sic) regulatory agencies, including but not limited to the Environmental Protection Agency, the

Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health. In the case of conflicting maximum permissible exposure levels, the lowest maximum permissible exposure level shall apply. For exposure in the work place, the eight-hour work place exposure level shall be considered the "federally permitted level of exposure." If no eight-hour work place exposure level exists, the lowest applicable maximum exposure level shall apply.

10 GCA § 41103(3).

Plaintiffs have failed to controvert defendants' claim that there is only one "eight-hour work place exposure level" standard: The Occupational Safety and Health Administration (OSHA) permissible exposure level (PEL). There are no other "federally (sic) regulatory agencies" that provide an eight-hour work place standard for PCBs.

The lowest OSHA PEL for PCBs is .5 mg/m3 (.5 milligrams per cubic meter or 500 micrograms per cubic meter). Numerous air samples were taken at the Piti Power Plant, beginning June 2, 1987, and continuing through March of 1990, when the Plant was declared free of contamination. No samples ever taken revealed a PCB level higher than the OSHA

standard. Thus, even under TSECA, plaintiffs have failed to meet their burden of showing sufficient exposure. 10 GCA § 41104(1).

4. Medical monitoring and Increased Risk

The requirements of the order are also in keeping with established case law from other jurisdictions.[6] "in cased claiming personal injury from exposure to toxic substances, it is essential that the plaintiff demonstrate that [he or] she was, in fact, exposed to harmful levels of such substances." Maddy v. Vulcan Materials Co., 737 F.Supp. 1528,

[6] The Court has been unable to find any reported cases from the Superior Court of Guam which address the tort law issues presented in this lawsuit.

1533 (D.Kan. 1990), citing Celotex Corp., supra, 477 U.S. at 319. See, also, Renaud v. Martin Marietta Corp., 749 F.Supp. 1545, 1555 (D.Colo. 1990)(plaintiff's burden at summary judgment hearing is to present a prima facie case of causation; i.e. that he or she was exposed to contaminants at levels sufficient to cause the injuries alleged). A plaintiff may not recover for continuing expenses of periodic medical check-ups absent a demonstrated injury. Hagerty v. L & L Marine Services, Inc., 788 F.2d 315, 319 (5th Cir. 1986).

Plaintiffs have submitted no competent evidence to indicate they fact an increased risk of future injury,

illness, or disease. Because a jury cannot award damages based on speculation or conjecture, a claim of increased risk of future injury, illness, or disease must be shown to be probable and reasonably certain not a mere possibility. See, e.g., Hagerty v. L & L Marine Services, Inc., 788 F.2d at 319 (plaintiff can recover only where he can show that the toxic exposure more probably than not will lead to disease); Herber v. Johns-Manville Corp., 785 F.2d 79, 82 (3rd Cir. 1986)("A future injury, to be compensable under New Jersey law, must be shown to be a reasonable medical probability."); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 411-412 (5th Cir.)(plaintiff with asbestosis also

entitled to recover for the "reasonable probability" of developing cancer in view of medical evidence that he had a greater than 50 percent chance of developing cancer), cert. denied, 478 U.S. 1022 (1986); Dartez v. Fibreboard Corp., 765 F.2d 456, 466 (5th Cir. 1985) (under Texas law, plaintiff may recover damages for a disease that may develop in the future only if it is established through expert testimony that there is a reasonable medical probability that the disease will appear); Laswell v. Brown, 683 F.2d 261, 269 (8th Cir. 1982)(a lawsuit for personal injuries cannot be based solely upon the mere possibility of some future harm), cert. denied, 459 U.S. 1219 (1983).

Where, as here, even a medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment. Fitzgerald v. Manning, 679 F.2d 341, 350 (4th cir. 1982)(in the context of a medical malpractice lawsuit).

For the foregoing reasons, the Court finds that plaintiffs did not fulfill their duties under the scheduling order and have failed to present a genuine issue of material fact so as to preclude summary judgment against them.

II. Plaintiffs Have Failed to Show Any present Physical Injury

Defendants argue that plaintiffs common law claims must fail because plaintiffs do not allege any actual present or past physical injury due to exposure to PCBs. Defendants assert that present injury is an essential element for any claim for future risks or for fear associated with those risks based on exposure to PCBs. Defendants also note

that plaintiffs have previously stated on the record that "in the vast majority of circumstances these [plaintiffs] have not had physical injuries which are treatable or observable at this point."[7]

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[7]Statement by attorney Bennet A. McConaughy to Judge Rothstein, Hearing on July 18, 1991, in Figueroa, et al v. United States of America, Guam District Court Civil No. 91-00030. All plaintiffs in this matter are also plaintiffs in Figueroa, although Figueroa also has additional plaintiffs not parties to this action.

Sitting in diversity, this Court generally would follow Guam substantive law. Erie Railroad Co. v. Thompkins, supra. However, as noted earlier, neither the parties nor the Court have found any Guam decisions on this issue. Insofar as Guam's Legislature has, in TSECA, spoken on the issue of the need for a present injury, such element is implicit in the Guam law.

As shown above, TSECA presumes an injury only when exposure to a certain level has been shown. Plaintiffs have failed to show sufficient exposure. It is not necessary to consider other aspects of TSECA when it is clear that plaintiffs have failed to surmount this hurdle. Therefore, all other avenues

being foreclosed, the Court will rely for its decision on traditional principles of tort law regarding the elements of negligence and outrageous conduct, strict liability, and breach of warranty.

A cause of action for negligence requires, inter alia, actual loss or damage to the interests of another. Prosser & Keeton, Torts, § 30, pp. 164-165 (5th ed. 1984). Intentional infliction of emotional distress by extreme or outrageous conduct requires "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." Id., § 12 at 60-64. The "great majority" of cases require actual

physical injury, id. at p. 64, but some courts allow recovery "if the enormity of the outrage itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial." Id.[8] Strict liability requires a defendant to make good "any actual harm" done to another. Id. § 75, p. 537. Finally, a breach of warranty claim also requires physical harm to persons or tangible things. Id. §97, pp. 690-694.

Each of plaintiffs' chosen causes of action requires as an essential element that there be proof of a physical injury

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[8]California law is in accord. See, Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1292 (9th Cir. 1987)(a cause of action for intentional infliction of emotional distress arises when the harm is inflicted; harm must be "severe.")

or evidence of severe and serious mental distress. Most plaintiffs claim no present physical injury. Of those plaintiffs who do claim present physical injuries, the injuries are limited to insomnia, irritability, and other hard-to-quantify general complaints. Headaches, insomnia, anxiety, and irritability are generally not a "severe" enough injury to support a cause of action for intentional infliction of emotional distress. See, e.g., Standard Wire & Cable Co. v. Ameri-Trust Corp., 697 F. Supp. 368 (C.D.Cal. 1988). There is no evidence that any plaintiff has sought or is currently under medical or psychiatric care as a result of the exposure to PCBs at the Piti Power Plant.

Simply put, there is not before the Court the quantum of evidence necessary to sustain any of these common law causes of action.

III. Guam's Toxic Substance Exposure Compensation Act of 1990

It is fundamental and longstanding principle of judicial restraint that a court will avoid reaching constitutional questions unless necessary. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.368 (1988). Because of the analysis above, it is unnecessary to consider any of the many constitutional challenges to TSECA.[9]

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[9]For the same reason, the Court does not decide whether it is necessary to allow Guam's Attorney General to intervene under 28 U.S.C. § 2403(b) to address any questions of TSECA'S constitutionality.

CONCLUSION

Plaintiffs have failed to adequately rebut defendants' assertion that plaintiffs , having alleged no present injury, have not stated a current cause of action under the common law or Guam's Toxic Substance Exposure Control Act. For this reason, defendants' motion for summary judgment is GRANTED.

However, the Court wishes to make it clear that it does not intend to foreclose future causes of action by any of these plaintiffs if and when an injury manifests itself. The Court recognizes, as have other courts and commentators, that those who have been exposed to toxic torts fact the dilemma of either having to sue before the statute of limitations

has run (and perhaps before any serious injury has become evident) or having to perhaps forego a remedy for a present, less serious injury, for fear that to recover on it might later bar them from recovery for a more serious illness or disease that does not occur until years later. Guam's TSECA also recognizes this problem, and provides that the statute of limitations can also be deemed to commence from the date of discovery of the harm caused by the exposure. 10 GCA § 41104(6). Common law also recognizes that a cause of action for toxic torts can be deemed to run from the date the injury becomes apparent.

See, e.g., Hagerty, supra, 788 F.2d at 320.

The U.S. Navy's monitoring program continues, at no cost to plaintiffs; and plaintiffs may yet institute their own medical monitoring program. It is the intent of the Court to expressly leave available to any plaintiff a cause of action for any injury or disease which evidences itself in the future.

FOR THE FOREGOING REASONS, defendants' three motions for summary judgment are GRANTED.

IT IS SO ORDERED.

DATED this 25th day of February, 1992.